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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RAYMOND J. RUBLE,
also known as "R.J. Ruble"

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At all times relevant to this case, Petitioner Raymond J. Ruble ("Ruble"), a tax lawyer, was a partner in the prominent law firm of Brown & Wood, later Sidley Austin Brown & Wood. In that capacity, among other duties, Ruble wrote opinion letters opining as to the validity of tax benefits derived from certain transactions, concluding that it was "more likely than not" that if the tax benefits were challenged by the Internal Revenue Service, a Court would uphold the tax treatment at issue. The major accounting firm of KPMG also wrote opinion letters endorsing the tax benefits derived from these transactions. The government disagreed with Ruble's tax opinions. Instead of contesting the tax issues through the normal processes of audit, civil assessment, and civil litigation in Tax Court or the District Court, the government filed numerous charges of criminal tax evasion against Ruble, as well as numerous partners and former partners at KPMG. The government's theory was that the tax benefits were invalid because the transactions at issue lacked the vague and inconsistently-applied doctrine of "economic substance" frequently raised by the government in tax cases involving complex transactions, such as those at issue here. Because Ruble's opinion letters reached a contrary conclusion on the issue of economic substance, the government indicted Ruble for criminal tax evasion in violation of 26 U.S.C. §7201. Following a trial, a jury convicted Ruble on these counts and the United States Court of Appeals for the Second Circuit affirmed.

The Second Circuit's affirmance of Ruble's conviction presents three questions meriting review:

1. Whether a criminal defendant can be guilty of tax evasion where the governing tax law is objectively unclear. *Cheek v. United States*, 498 U.S. 192 (1991).

2. Whether Ruble could legally be convicted of tax evasion under 26 U.S.C. §7201 where his conduct consisted largely of the drafting of opinion letters and was remote from the preparation of the tax returns of the taxpayers at issue.

3. Whether the Second Circuit deviated from well-established law by upholding Ruble's conviction in spite of the fact that the evidence failed to establish that Ruble knew that the tax transactions at issue lacked economic substance, no matter how that vague concept is defined.

PARTIES TO THIS PROCEEDING

In addition to the parties shown in the caption, John Larson ("Larson") and Robert Pfaff ("Pfaff") were also defendants-appellants below. They are filing a separate petition for a writ of certiorari.

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OPINION BELOW

The Second Circuit's opinion is not reported. The Second Circuit initially affirmed Ruble's conviction, as well as those of the co-appellants, in a summary order dated August 27, 2010 which did not even mention the specific appellate issues Ruble had raised. After Ruble filed a petition for rehearing, the Second Circuit issued an "Amended Summary Order" dated October 26, 2010 again affirming the convictions and giving a brief explanation of its reasons for doing so as to Ruble (App. 1a). All of the necessary opinions have been printed in the petition being filed by Larson and Pfaff.

JURISDICTION

The Second Circuit denied rehearing on November 22, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 U.S.C. §7201 and the Due Process Clause of the Fifth Amendment are involved in this case.

STATEMENT OF THE CASE

A more comprehensive statement of the case is presented in the petition filed by co-appellants below Larson and Pfaff. We respectfully invite the Court's attention to that petition for a more detailed statement of the case. The following sets forth a statement of the case pertinent to Ruble.

Factual Background

Ruble is a prominent tax attorney and has been a partner at several major New York law firms. During the period of time relevant to this case, Ruble was a partner in the firm of Brown & Wood, later Sidley Austin Brown & Wood.

This case involved the design and promotion of "tax shelters" by the international accounting firm of KPMG. Although the term "tax shelter" often has derogatory connotations, tax shelters are not necessarily illegal and are in many respects perfectly appropriate under the Internal Revenue Code.

Personnel at KPMG designed the tax shelter transactions on behalf of wealthy clients seeking to reduce tax liability. In varying ways, the transactions all involved a "basis shift", namely, an investment transaction resulting in the creation of an asset held by the taxpayer having a high "basis" for tax purposes, which the taxpayer could then dispose of in order to generate a deductible tax loss. In addition to designing the tax shelters, KPMG also wrote opinion letters for its clients, supporting the favorable tax treatment resulting from the transactions and opining that it was "more likely than not" that a court would rule favorably on the tax treatment of the transactions. Clients who acted in reliance upon KPMG's opinion letters could seek to avoid liability for civil tax penalties, even assuming that the Internal Revenue Service audited the taxpayers and disallowed the tax benefits resulting from the transactions.

Two of the KPMG personnel who had worked on these tax shelter transactions, Larson and Pfaff, left

KPMG in 1997 and formed Presidio Advisors LLC ("Presidio"). Presidio continued to work closely with KPMG in connection with the transactions, and it made arrangements for the implementation of the numerous financial transactions that were components of the tax shelters.

Ruble's involvement in the case was two-fold. First, Ruble worked with KPMG personnel in designing some of the tax shelters in order to satisfy certain requirements of the Internal Revenue Code. Second, Ruble wrote concurring "second opinions" on behalf of his law firm opining that it was "more likely than not" that a court would uphold the tax treatment of the transactions if challenged by the IRS. KPMG supplied these second opinions to its clients. Ruble had no direct contact with any of the KPMG clients who entered into the transactions.

All of the opinion letters issued by Ruble's firm stated specifically that they were predicated upon certain specific factual representations by the taxpayers, Presidio, and other parties involved in the transactions. These representations included statements that the investor in the transaction "believed there was a reasonable opportunity to earn a reasonable pre-tax profit from the transactions" and that "Presidio believed there was a reasonable opportunity for Investor to earn a reasonable pre-tax profit, in excess of all associated fees and costs, and without regard to any tax benefits that may occur, by participating in the [transaction]." All of the opinions issued by Ruble's law firm provided expressly that if any of the representations set forth therein was inaccurate in any material respect, then the opinions "may not be relied upon."

The specific counts of tax evasion on which Ruble was convicted all pertained to a particular transaction, known by the acronym "BLIPS". In late 1998 and early 1999, KPMG and Presidio, along with Ruble and other tax lawyers, began working on the design of the transaction that came to be known as BLIPS. The "basis shift" aspect of the BLIPS transaction involved having taxpayer-controlled entities enter into large premium loans, generally through Deutsche Bank. These loans were to be coupled with an investment program that was to carry the potential of generating a non-tax economic profit.

In early 1999, Presidio brought on a new partner, Amir Makov ("Makov") to design the investment program that would be part of the BLIPS transactions. Makov had stellar academic and occupational credentials as a trader, investment adviser, and an expert in foreign currencies and derivatives trading. Makov designed an investment program involving investments in forward contracts in foreign currencies that are "pegged" to the U.S. dollar, specifically, the Argentine Peso and the Hong Kong Dollar. These investments carried the potential of generating a very large profit in a short period of time. Pegged currencies tend to maintain an artificially high exchange rate. When the currencies become "de-pegged" or when the peg "breaks", the currencies generally devalue by a very large amount in a very short period of time. An investment in forward contracts in such currencies therefore could be extremely profitable, depending upon the timing of the breaking of the peg.

Ruble was not told by Makov or anyone else that the BLIPS transactions did not have a "reasonable possibility" of generating an economic profit based on the

currency transactions Makov designed. On the contrary, as described above, both Presidio and the taxpayers themselves consistently represented to Ruble that the transactions did have the potential to generate economic non-tax profits.

District Court Proceedings

Ruble and eighteen other defendants were indicted for various tax offenses. On July 16, 2007 the District Court dismissed the Indictment with respect to thirteen of the defendants who had been employed by KPMG, based on the government's violation of those defendants' Sixth Amendment right to counsel. *United States v. Stein*, 495 F.Supp.2d 390 (S.D.N.Y. 2007). On an appeal by the government, the Second Circuit affirmed the dismissal of the indictment as to those defendants. *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

Trial as to the remaining defendants and counts commenced on October 14, 2008. As described above, the government's argument was that the BLIPS transaction lacked "economic substance" and therefore could not give rise to valid tax benefits. In instructing the jury on this issue, the District Court declined to follow the jury charges that had previously been approved in the Second Circuit in criminal tax cases in which the economic substance issue had arisen. *United States v. Atkins*, 869 F.2d 135, 139-140 (2d Cir.), *cert. denied*, 493 U.S. 818 (1989); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 98 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983); *United States v. Regan*, 937 F.2d 823, 828 (2d Cir. 1991). Under these instructions, a transaction will be deemed to lack economic substance for criminal tax purposes if it has

no purpose other than the creation of a tax deduction, if it has no possibility of generating an economic profit, if it was subject to no market risk, and if it had no economic significance independent of tax consequences.

Instead of following these approved instructions applicable to criminal tax cases, the District Court looked to the tangled mess of civil tax caselaw, in which courts have struggled, inconsistently and unsuccessfully, to come up with a comprehensible definition of economic substance. The District Court thus came up with its own instructions, which set forth both "subjective" and "objective" components to the concept of economic substance, charging the jury that a transaction would lack economic substance if the taxpayer subjectively had no non-tax purpose for entering into the transaction, giving several inappropriate examples illustrating how the jury might make such a determination about a taxpayer's subjective purposes (most taxpayers did not testify at the trial, compounding the problem of determining their subjective purposes), and if objectively the transaction lacked a "reasonable" possibility of making an economic profit. The terms "reasonable possibility" were undefined.

On December 17, 2008, based on the foregoing instructions, the jury returned a verdict as to Ruble of guilty on ten counts of tax evasion. All of the counts of tax evasion on which Ruble was convicted involved the BLIPS transaction.

On February 5, 2009, Ruble moved for judgment of acquittal pursuant to Fed.R.Crim.P. 29(c). On April 1, 2009, the District Court orally denied Ruble's motion for judgment of acquittal, and the District Court entered a

written decision denying Ruble's motion on April 2, 2009. *United States v. Ruble*, 2009 WL 911035 (S.D.N.Y. April 2, 2009). The District Court expressly found that Ruble's case presented substantial issues for appellate review, and granted Ruble bail pending appeal.

Proceedings in the Second Circuit

The Second Circuit affirmed by summary order Ruble's conviction, as well as those of Larson and Pfaff. The Second Circuit upheld the District Court's deviation from prior caselaw setting forth the appropriate instructions in criminal tax cases in which the doctrine of economic substance is at issue and instead relying on the vague definition derived from civil tax law. The Second Circuit stated that its decisions in prior criminal tax cases do not define the "outer limits" of the economic substance doctrine, but offered no guidance as to where those "outer limits" might be found.

The Second Circuit further found that vagueness in the doctrine of economic substance did not foreclose a criminal tax conviction in this case. However, since a criminal tax conviction requires proof of willfulness, which this Court has defined as a "voluntary intentional violation of a *known* legal duty", *Cheek v. United States*, 498 U.S. 192, 201 (1991), the Second Circuit did not explain how, under this definition, criminal liability could possibly be sustained in a case where the "legal duty" is sufficiently vague so as to make it impossible as a matter of law for anyone to "know" what his or her legal duty is. The Second Circuit also upheld the government's expansive use of Section 7201 in this case.

As noted previously, the Second Circuit's initial summary order did not even mention the arguments Ruble had advanced that the government failed to establish that Ruble knew that the BLIPS transaction lacked economic substance, no matter how that term is defined. After Ruble moved for rehearing, the Second Circuit issued an amended summary order which inserted a brief paragraph holding without detailed explanation that the proof of Ruble's guilt was sufficient.

REASONS FOR GRANTING THE WRIT

The reasons for granting review in this case are set forth at length in the petition of Larson and Pfaff. The Court's attention is respectfully invited to that petition.

1. The doctrine of "economic substance" as applied in tax cases is an anomaly. It is not a canon of statutory construction. It is not an interpretive device that can be used to effectuate Congressional intent. Rather, the economic substance doctrine is a judicially-created additional element that the Internal Revenue Service and courts apply – inconsistently – to amplify the technical requirements Congress established to govern questions of taxability under the Internal Revenue Code. In effect, what the economic substance doctrine does is to say that even though a transaction may be in full compliance with all of the technical requirements of the Internal Revenue Code to make the transaction eligible for a certain tax treatment, the Internal Revenue Service and the courts may nevertheless reach a different conclusion by holding that notwithstanding technical compliance with the statutory provisions of the tax laws as enacted by Congress, the vague concept of economic substance

mandates an outcome that differs from the outcome that would follow from mere statutory compliance.

Moreover, the economic substance doctrine as applied in tax cases is a one-way street. It is a doctrine that can be invoked only by one side in a tax controversy – the Internal Revenue Service. Unlike the Internal Revenue Service, taxpayers are held to technical compliance with the Internal Revenue Code. Thus, while the Internal Revenue Service can argue that notwithstanding technical compliance with the Code the tax treatment of a transaction can be altered because of a lack of economic substance, a taxpayer cannot argue the converse, namely, that even if a transaction did not comply with the technical requirements of the Code, it should nevertheless be granted the requested tax treatment because the substance of the transaction was consistent with the purposes of the tax law.

Thus, the economic substance doctrine in tax cases is unique in the law. The doctrine permits one party to a tax controversy to ignore the terms of the tax laws enacted by Congress by imposing an additional requirement – economic substance – not found in the statutes. Not surprisingly, the application of the doctrine in the caselaw is vague, inconsistent and confusing.

When the government seeks to import the economic substance doctrine into a criminal tax case such as this, formidable problems of unconstitutional vagueness arise. In the past, the Second Circuit attempted to avoid some of these issues by endorsing a limited definition of economic substance uniquely applicable to criminal tax cases. Under this standard, transactions would be deemed

lacking in economic substance only if the transaction had no possibility of generating an economic profit, had no market risk, and had no purpose other than the creation of tax benefits. *United States v. Atkins*, 869 F.2d 135, 139-140 (2d Cir.), *cert. denied*, 493 U.S. 818 (1989); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 98 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983); *United States v. Regan*, 937 F.2d 823, 828 (2d Cir. 1991). Here however, the District Court deviated from the path set down by these cases and instead looked to the confusing body of civil tax law to come up with a definition of economic substance. In doing so, the court placed the legal questions of unconstitutional vagueness and lack of willfulness as a matter of law squarely at issue in this case.

Where an issue of law is objectively vague and uncertain, it ought to follow that as a matter of law, criminal liability cannot be imposed for a violation of such a law since no one could possibly "know" that he or she has violated the law. *James v. United States*, 366 U.S. 213, 220-221 (1961). Nevertheless, the Second Circuit, without clear explanation, reached a contrary conclusion. The lower courts are sharply divided on the question of whether the objective vagueness of a particular law negates criminal liability as a matter of law. *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974)(vacating conviction); *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985)(vacating conviction); *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991)(vacating conviction); *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983)(vacating conviction); *United States v. Heller*, 830 F.2d 150 (11th Cir. 1987)(vacating conviction); *United States v. Pirro*, 212 F.3d 86 (2d Cir. 2000)(striking portion of indictment based on vagueness of tax law); *United States v. Garber*,

607 F.2d 92 (5th Cir. 1979)(en banc)(treating vagueness as having both legal and factual components); *Atkins*, 869 F.2d 135 (affirming conviction based on narrow definition of economic substance); *Ingredient Technology Corp.*, 698 F.2d 88 (affirming conviction based on narrow definition of economic substance); *United States v. Curtis*, 782 F.2d 593 (6th Cir. 1986)(finding vagueness in the tax law irrelevant and affirming conviction).

Since this case squarely presents the issues that arise when the government seeks to apply the vague doctrine of economic substance in a criminal tax case, this Court should grant review to clarify the law on an issue that is of significant national importance to the fair administration of the tax laws.

2. The Court should also grant review with respect to the Second Circuit's virtually limitless interpretation of the tax evasion statute, 26 U.S.C. §7201. Historically, this statute has generally applied to taxpayers who willfully attempt to evade and defeat their own tax liabilities. Ruble, however, was convicted of evading the taxes of ten investors in the BLIPS transaction – people whom Ruble never even met. Ruble's role in this case largely consisted of drafting second opinion letters that KPMG provided to investors in the BLIPS transactions. Ruble had no role in preparing the actual tax returns of the taxpayers at issue, and he had no knowledge of the individual taxpayers' overall taxable income or deductions, other than as it pertained to BLIPS.

A charge under Section 7201 for conduct of this kind is unprecedented. This Court should grant review in order to clarify the law as to when a defendant's conduct is too

remote from a taxpayer's filing of false tax returns in order to render a defendant liable for criminal tax evasion under Section 7201.

3. The Court should also grant review with respect to the particular issues that arise in Ruble's case. There simply was no evidence at all that Ruble knew that the BLIPS transactions lacked economic substance, no matter how that term is defined. When dealing with a concept as vague and ill-defined as economic substance in the context of a criminal tax case, at the very least the government should be held to the highest standards of proof establishing a defendant's guilty knowledge. The government failed to do this in Ruble's case. Accordingly, the Court should also grant review of the particular issues raised by Ruble's conviction relating to his knowledge on the issue of economic substance, under any definition of that vague concept.

CONCLUSION

The petition of Ruble, as well as the petition filed by Larson and Pfaff, should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — AMENDED SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 26, 2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AT A STATED TERM OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, HELD AT THE DANIEL PATRICK MOYNIHAN UNITED STATES COURTHOUSE, 500 PEARL STREET, IN THE CITY OF NEW YORK, ON THE 26TH DAY OF OCTOBER, TWO THOUSAND TEN.

PRESENT: DENNIS JACOBS,
Chief Judge,
RALPH K. WINTER,
JOSEPH M. McLAUGHLIN,
Circuit Judges.

United States of America,

Appellee,

-v.-

Robert Pfaff, Raymond J. Ruble, also known as R.J. Ruble, John Larson,

Defendants-Appellants.

09-1702-cr(L), 09-1707-cr(CON), 09-1790-cr(CON)

AMENDED SUMMARY ORDER

Appendix A

Appeal from a judgment of the United States District Court for the Southern District of New York (Kaplan, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Appellants' convictions and Larson's term of imprisonment be **AFFIRMED.**

Raymond Ruble, Robert Pfaff, and John Larson appeal from judgments of conviction and a sentence entered April 15, April 21, and April 24, 2009, respectively, in the United States District Court for the Southern District of New York (Kaplan, *J.*). Appellants were convicted of tax evasion, and sentenced principally to terms of imprisonment and fines. In a separate *per curiam* opinion filed today, we decide the challenge to Larson's fine, imposed under 18 U.S.C. § 3571(d). We assume the parties' familiarity with the underlying facts and the case's procedural history.

Appellants raise five issues here: [1] whether the jury instructions were flawed; [2] whether the evidence was sufficient to support their convictions; [3] whether the government's case at trial constructively amended the indictment; [4] whether they are entitled to have their indictments dismissed pursuant to *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008); and [5] whether the district court erred in imposing Larson's sentence. The issues are considered *seriatim*.

[1] We find no error in the district court's jury instructions. "We review jury instructions de novo, and reverse only when the charge, viewed as a whole,

constitutes prejudicial error." *United States v. Amato*, 540 F.3d 153, 164 (2d Cir. 2008). The district court charged the jury that a transaction lacks non-tax economic effect when there is "no reasonable possibility that the transaction would result in a profit." On the facts of this case (where the non-tax economic effect proffered by the defense was the possibility of profit), that was a correct statement of the law. *See, e.g., Goldstein v. Commissioner*, 364 F.2d 734, 740 (2d Cir. 1966) (disallowing "deduction for [transactions] that can not *with reason* be said to have purpose, substance, or utility apart from their anticipated tax consequences," in case where taxpayer could have realized a $22,875 profit given favorable market changes (emphasis added)). We have in the past affirmed jury instructions stating a narrower definition. *See, e.g., United States v. Atkins*, 869 F.2d 135, 140 (2d Cir. 1989) (approving instruction that transaction has no non-tax economic effect if it is "subject to no market risk"). But we have not held that those instructions state the outer limits of the economic substance doctrine. Nor do we find any error in the district court's circumstantial evidence examples, which were, if anything, favorable to the defense.

[2] The evidence was sufficient to support the convictions. When reviewing a conviction for sufficiency of evidentiary support, "the trial evidence is viewed most favorably for the Government" and "all reasonable inferences a jury may have drawn favoring the Government must be credited." *United States v. Wexler*, 522 F.3d 194, 206-07 (2d Cir. 2008). We affirm "'if any rational trier of fact could have found the essential elements of [the] crime beyond a reasonable doubt.'" *Id.* at 207 (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

There is sufficient evidence that the transaction lacked any non-tax economic effect. Testimony described the chances of profiting from the investments as "basically zero."

Sufficient evidence also supports the jury's finding that the transactions were entirely motivated by tax purposes. Clients testified that the transactions were marketed solely as tax-avoidance schemes, and that, as clients, they had no non-tax business purpose in executing them. Evidently, that is why, at the outset of the purportedly seven-year scheme, a good number of BLIPS clients attempted to limit their commitment to sixty days, even though exiting so early would significantly limit their (already nugatory) chances of profiting on the currency forwards. BLIPS was designed, marketed, and executed as a tax shelter; and the jury was warranted in concluding that all parties knew BLIPS's profit potential to be nothing more than a pretext.

In a challenge to the finding of willfulness, Appellants argue that "economic substance" law was too vague to support their convictions. Citing *United States v. Pirro*, 212 F.3d 86, 91 (2d Cir. 2000), Appellants contend that economic substance law was not sufficiently "knowable." But "knowability," except perhaps as probative of a defendant's subjective belief in the lawfulness of his conduct, is only relevant insofar as it bears on constitutional vagueness. Vagueness of the law does not *ipso facto* negate a jury finding of willfulness. *See United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 97 (2d Cir. 1983). And economic substance law is not unconstitutionally vague: It has been applied in criminal cases before, and (as discussed) is not unsettled in the way Appellants contend. *Cf. Pirro*, 212

F.3d at 91 (affirming partial dismissal of an indictment insofar as it charged a violation of a purported legal duty the existence of which was an open question).

In addition, sufficient evidence was presented to the jury to support its finding that Ruble either knew or consciously avoided knowing that the taxpayers lacked a non-tax business purpose for engaging in the transaction, and that there was no reasonable possibility that the transaction would yield a profit. As discussed above, Ruble was aware that the investors had no reasonable expectation of a profit unless they remained invested for the long term, and that most of the investors had exited the deals within sixty days. Moreover, the jury was free to infer that Ruble knew that the transaction had no business purpose based on his close relationship with Pfaff and Larson.

Finally, we disagree that Appellants' actions fall outside the ambit of the tax evasion statute, 26 U.S.C. § 7201. Section 7201 provides, in relevant part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony.

The statute's expansive language is not susceptible to a limitation that would exclude Appellants. No case interpreting § 7201 appears to have adopted any limit to its reach; those cases that have considered § 7201's scope have rather expressed it expansively, *see, e.g.*, *United States v. Townsend*, 31 F.3d 262, 267 (5th Cir. 1994)

("[Section] 7201 is not limited to prosecutions of those who evade taxes that they may owe themselves, but rather it encompasses prosecutions of any person who attempts to evade the tax of anyone."). Appellants involved themselves, with the requisite intent, in a scheme to avoid taxes, and we see no statutory basis for excluding them from liability under § 7201.

[3] Appellants' argument concerning constructive amendment is reviewed *de novo*. *United States v. Rigas*, 490 F.3d 208, 225 (2d Cir. 2007). They argue that the government undertook to prove at trial a conspiracy of the Appellants *against* KPMG, rather than the charged conspiracy *with* KPMG. But Appellants were acquitted of conspiracy. Constructive amendment of the conspiracy charge would have warranted vacatur of that charge only; the remainder of the indictment would have stood. *See United States v. Milstein*, 401 F.3d 53, 64-66 (2d Cir. 2005) (per curiam) (vacating conviction on one count for constructive amendment of indictment with respect to that count, and rejecting argument that the constructive amendment warranted vacatur of convictions on other counts). Because no Appellant was convicted of conspiracy, we would be unable to afford relief even if we were to find error.

[4] The district court found that KPMG would not have paid Pfaff's and Larson's legal fees in this case, and that dismissal under our decision in *Stein* was therefore unwarranted. We review this finding for clear error. *Stein*, 541 F.3d at 142, 146. Pfaff and Larson point to a number of facts that they claim demonstrate the clear error of the

district court's finding, none persuasive. Most strongly emphasized are three pieces of evidence.

First is a 2004 statement by KPMG then-CEO Gene O'Kelly that "[a]ny present *or former* members of the firm asked to appear will be represented by competent coun[se]l *at the firm's expense*." *United States v. Stein*, 495 F. Supp. 2d 390, 407 (S.D.N.Y. 2007) (first emphasis added). But this statement speaks not at all to what conduct the promise covers, and is therefore of limited independent value. Pfaff and Larson note that some of their indicted conduct occurred while they were at KPMG; but that conduct was minimal relative to the indicted conduct after they left. There is no direct evidence that KPMG considered such a small proportion to be enough, and it was reasonable for the district court to infer in the circumstances that KPMG would not have paid Pfaff's and Larson's fees, given the incentives driving fee payment in the first place, *see Stein*, 541 F.3d at 144 ("[A] firm may have potent incentives to advance fees, such as the ability to recruit and retain skilled professionals in a profession fraught with legal risk.").

Second, Pfaff and Larson compare their situation to that of Gregg Richie, whose attorney's fees, the district court found, would have been paid by KPMG. However, in contrast to Pfaff and Larson, Ritchie had little involvement with BLIPS after leaving KPMG. Ritchie's relevant conduct post-KPMG appears to constitute only a small part of his involvement with BLIPS, as compared with his role as head of KPMG's CaTs ("Capital Transaction Strategies") group--"[t]he KPMG group focused on

designing, marketing, and implementing tax shelters for individual clients."

Finally, Pfaff and Larson point to KPMG's payment of their legal fees in the *Perez v. KPMG* civil case, which they contend demonstrated KPMG's willingness to pay their legal fees in connection with legal proceedings arising from BLIPS. But the *Perez* case involved conduct undertaken entirely during Pfaff's and Larson's employment at KPMG, *see* Notice of Removal at 25-37, *Perez v. KPMG*, No. 7:03-cv-00026 (S.D. Tex. Jan. 24, 2003); and is therefore distinguishable on the lines discussed.

[5] Larson argues that his term of imprisonment is impermissibly longer than the sentences imposed on other defendants. We review sentencing decisions for "reasonableness," employing "the familiar abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 46 (2007). As Larson contends, the district court relied on the defendants' ages, observing that any lengthy sentence "would be a life sentence without parole for all these men." Since Larson is just 13 months younger than Pfaff, it would have been questionable to rely on this factor alone to justify a sentence disparity. But the district court stated that age was merely one of the factors justifying the difference. The district court properly relied on the fact that Larson moved assets abroad in order to protect them from creditors and from the government. *See* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the

United States may receive and consider for the purpose of imposing an appropriate sentence.").

In a separate *per curiam* opinion filed today, we decide the challenge to Larson's fine, imposed under 18 U.S.C. § 3571(d). Finding no merit in Appellants' remaining arguments, we accordingly **AFFIRM** Appellants' convictions and Larson's term of imprisonment.

FOR THE COURT:

/s/

CATHERINE O'HAGAN WOLFE, CLERK

No. 10-1061

In the Supreme Court of the United States

RAYMOND J. RUBLE, AKA R.J RUBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that any ambiguity in the application of the "economic substance" doctrine did not negate the jury's finding that petitioner acted willfully in committing tax evasion.

2. Whether the court of appeals correctly held that 26 U.S.C. 7201, which provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax * * * [is] guilty of a felony," may be applied to petitioner because he assisted third-party taxpayers in filing false tax returns.

3. Whether the court of appeals correctly held that there was sufficient evidence presented at trial that petitioner was aware that the loan-premium transactions at issue lacked economic substance.

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In the Supreme Court of the United States

No. 10-1061

RAYMOND J. RUBLE, AKA R.J. RUBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-9a) is not published in the Federal Reporter but is available at 407 Fed. Appx. 506.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2010. A petition for rehearing was denied on November 23, 2010 (Larson Pet. App. 13a-14a).[1] The petition for a writ of certiorari was filed on February 22,

[1] Petitioner's co-defendants, John Larson and Robert Pfaff, have separately petitioned for a writ of certiorari. See *Larson* v. *United States*, No. 10-1049 (filed Feb. 22, 2011). Petitioner relies (Pet. 8) heavily on the arguments set forth in the Larson petition, and this brief therefore refers at various points to the Larson petition and appendix.

2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on ten counts of tax evasion, in violation of 26 U.S.C. 7201. The district court sentenced petitioner to a term of imprisonment of 78 months, to be followed by two years of supervised release. The court of appeals affirmed. Pet. App. 1a-9a.

1. During the mid-1990s, petitioner was a tax partner at the law firm of Brown & Wood LLP. His co-defendants, John Larson and Robert Pfaff, were tax professionals at the accounting firm KPMG LLP (KPMG). In 1997, they left to establish Presidio Advisors LLC (Presidio), which purported to be an investment advisory company. At Presidio, Larson and Pfaff designed, marketed, and implemented individual tax shelters, primarily in conjunction with KMPG on behalf of KMPG's wealthy clients. In 1998, Larson, Pfaff, and petitioner began developing the tax shelter at issue in this case: Bond Linked Issue Premium Structure (BLIPS). Larson and Pfaff designed and implemented BLIPS, and petitioner issued opinion letters that assisted in the operation and marketing of BLIPS. Pet. C.A. Br. 5-8; Gov't C.A. Br. 4, 7-9.

BLIPS was designed to look like a seven-year investment program that sought to generate high returns through the use of a particular kind of high-interest loan (called a "premium loan") and foreign currency investments. But in fact all but two of the nearly 200 BLIPS clients exited the program within two months (and the remaining two clients exited in less than a year). All of

those clients thus removed their money not long after investing it, and in the process they generated multi-million dollar paper losses—losses that the clients could use to offset other investment gains, thereby evading the taxes due on those unrelated investments. According to the government, petitioner and his co-defendants thus designed BLIPS to generate massive, short-term tax deductions while appearing to be a profit-motivated, long-term investment program. Pet. C.A. Br. 9; Gov't C.A. Br. 4-6.

2. Specifically, BLIPS was structured as a three-stage program: Stage I lasted 60 days; Stage II lasted another 120 days; and Stage III extended through the end of the seventh year. At each stage, a client was required to contribute significantly more capital to remain invested in BLIPS. In order to participate in the program and generate a tax loss, a client followed three steps. Gov't C.A. Br. 12-31.

a. First, a client would form a single member limited liability corporation (LLC-1), which would obtain from one of the banks working with Presidio a large non-recourse loan at a fixed rate with a seven-year term. Only clients who sought to generate a minimum tax loss of $20 million were eligible for BLIPS. Because the amount of the tax loss was tied directly to the amount of the loan, the loans at issue ranged from tens to hundreds of millions of dollars. And because each loan was non-recourse, the issuing bank was limited to seeking repayment from LLC-1, which had essentially no assets. To protect itself, the issuing bank thus would not permit LLC-1 to use or control the loan. None of the loan funds ever left the bank's control. Gov't C.A. Br. 12-15.

To generate the tax loss, LLC-1 would agree to pay the bank an abnormally high interest rate. In return,

the bank would agree to extend not only the face amount of the loan, but some additional amount of money called "the loan premium." The loan premium ostensibly approximated the net present value of all the above-market interest payments over the seven-year term of the loan. In theory, the bank would recoup its premium over time through the unusually high interest rate on the loan principal. In reality, the amount of the premium was determined by the amount of the tax loss that the client sought to generate. In the event that the loan was prepaid early (as every BLIPS loan was), the loan agreement called for a prepayment penalty to serve the same purpose. Gov't C.A. Br. 14-15.

b. Second, LLC-1 would contribute the funds from both the loan and the loan premium to LLC 2, a partnership in which LLC-1 had a 90% interest and Presidio had a 10% interest as the managing partner. As part of the transaction, LLC-2 assumed the obligation to repay the loan principal but not the loan premium. In addition to the loan funds, LLC-1 would contribute a further amount equal to 7% of the desired tax loss. That amount was paid by the client and was the client's only actual exposure to a potential loss. LLC-2 would then invest a portion of the client's cash fee in foreign currency investments. LLC-2 would not (and, indeed, could not) invest any of the loan funds, because those funds remained in the lending bank's sole control. Gov't C.A. Br 13-15.

c. Third and finally, the client would exit BLIPS after a brief time. All but two of the nearly 200 BLIPS clients exited the program at the end of Stage I, and the two remaining clients exited before year-end to obtain the benefit of the tax loss. To exit the program, a client would direct Presidio to terminate LLC-1's participation

in LLC-2 and redeem LLC-1's partnership interest. The client would then receive a "liquidating distribution" of assets, consisting of either stock or currency (depending on whether the client was seeking to offset a capital gain or ordinary income). The distribution consisted of whatever remained of the client's seven percent cash fee, less any expenses. Gov't C.A. Br. 16-17 & n.*.

Regardless of the value of those assets, petitioner and his co-defendants claimed that the client's "basis" for tax purposes—or the starting value of LLC-1's partnership interest in LLC-2—was the amount of the loan premium. Under 26 U.S.C. 722 and 752, a taxpayer's basis in a partnership interest is equal to the value of any property and cash contributed to the partnership, less the amount of any liabilities assumed by the partnership. Petitioner and his co-defendants claimed that LLC-2 had assumed the loan principal, but not the loan premium, as a liability. On their view, that loan premium should be treated as money that LLC-1 had invested in the partnership. Because petitioner and his co-defendants took the position that the client's basis for tax purposes was the loan premium, it invariably appeared as if the client had lost many millions of dollars by investing in BLIPS: the amount of the loan premium (the client's putative investment) minus the terminating distribution from LLC-2 (the client's actual return). Gov't C.A. Br. 17-19.

3. Petitioner and his co-defendants' interpretation of the Internal Revenue Code depended on their false characterization of BLIPS as a long-term investment program that required a seven-year premium loan. As an initial matter, the three banks that made BLIPS loans required that the loans be carried on their books only for a short time period, not to exceed the end of the

year. The loan funds were required to remain in accounts at the lending banks under those banks' control. The loan funds also were exchanged from dollars into Euros, in order to make it appear as if the funds would be used for foreign currency investments. Gov't C.A. Br. 20-24.

In addition, the BLIPS investments were not designed to make a profit. Those investments were in "forward contracts" for "pegged" foreign currencies, principally the Hong Kong dollar and the Argentine peso. In essence, Presidio (as the managing partner for each LLC-2) was betting that those foreign currencies, which at the time were pegged to the American dollar, would "break the peg" and devalue during the life of the forward contract. But currencies like the Hong Kong dollar and Argentine peso were then relatively stable. Indeed, Presidio chose those currencies because they had a low chance of devaluation and thus forward contracts were cheaper, which was important given the limited funds that each LLC-2 had available. The risk of devaluation was particularly low in the short term, which was the only duration of forward contract that Presidio could afford to purchase. Gov't C.A. Br. 25-30.

4. Together with co-defendants Larson and Pfaff, petitioner developed and played an important role in the BLIPS program. Most importantly, petitioner authored more than 150 opinion letters in 1999 for BLIPS' clients, each one indicating in boilerplate language that the client had exited at or near the sixtieth day because of the investment's comparative performance. Those letters were based on a template that petitioner had created before BLIPS had any clients. In addition to the legal work that petitioner received from his participation in

BLIPS, he also received two separate payments of $250,000 from Presidio. Gov't C.A. Br. 16, 145.

5. On October 17, 2005, the government charged petitioner and his co-defendants through a superseding indictment with a conspiracy to defraud the United States through the development, sale, and implementation of fraudulent tax shelters. The indictment charged petitioner with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and multiple counts of tax evasion, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2. On December 17, 2008, after a two-month trial, the jury acquitted petitioner of the conspiracy count but convicted him on ten counts of tax evasion. The district court sentenced petitioner to a term of imprisonment of 78 months, to be followed by two years of supervised release. Gov't C.A. Br. 2-3.

6. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-9a. As relevant here, the court held that the district court had correctly charged the jury "that a transaction lacks non-tax economic effect when there is no reasonable possibility that the transaction would result in a profit." *Id.* at 3a (internal quotation marks omitted). The court recognized that it had "in the past affirmed jury instructions stating a narrower definition," *ibid.* (citing *United States* v. *Atkins*, 869 F.2d 135, 140 (2d Cir.) (upholding instruction that transaction has no non-tax economic effect if it is "subject to no market risk"), cert. denied, 493 U.S. 818 (1989)), but the court likewise recognized that "[it had] not held that those instructions state the outer limits of the economic substance doctrine," *ibid.*

Applying that test, the court of appeals held that "[t]he evidence was sufficient to support the convictions." Pet. App. 3a. The court found "sufficient evi-

dence that the transaction lacked any non-tax economic effect," because "[t]estimony described the chances of profiting from the investments as 'basically zero.'" *Id.* at 4a. The court noted that "[c]lients testified that the transactions were marketed solely as tax-avoidance schemes, and that, as clients, they had no non-tax business purpose in executing them." *Ibid.* The court concluded that "BLIPS was designed, marketed, and executed as a tax shelter; and the jury was warranted in concluding that all parties knew BLIPS' profit potential to be nothing more than a pretext." *Ibid.*

With respect to petitioner in particular, the court of appeals held that "sufficient evidence was presented to the jury to support its finding that [petitioner] either knew or consciously avoided knowing that the taxpayers lacked a non-tax business purpose * * * and that there was no reasonable possibility that the transaction would yield a profit." Pet. App. 5a. As the court of appeals recognized, "[petitioner] was aware that the investors had no reasonable expectation of a profit unless they remained invested for the long term[] and that most of the investors had exited the deals within sixty days." *Ibid.* As a result, the court reasoned, "the jury was free to infer that [petitioner] knew that the transaction had no business purpose based on his close relationship with [co-defendants] Pfaff and Larson." *Ibid.*

The court of appeals rejected petitioner's argument that "'economic substance' law was too vague to support [his] convictions" and "was not sufficiently 'knowable.'" Pet. App. 4a. The court held that "'knowability,' except perhaps as probative of a defendant's subjective belief in the lawfulness of his conduct, is only relevant insofar as it bears on constitutional vagueness." *Ibid.* According to the court, "[v]agueness of the law does not *ipso*

facto negate a jury finding of willfulness." *Ibid.* (citing *United States* v. *Ingredient Tech. Corp.*, 698 F.2d 88, 97 (2d Cir.), cert. denied, 462 U.S. 1131 (1983)). The court further held that economic substance law is not only sufficiently clear for constitutional purposes, but "has been applied in criminal cases before" and "is not unsettled in the way" that petitioner contended. *Ibid.*

Finally, the court of appeals disagreed with petitioner's claim that "[his] actions fall outside the ambit of the tax evasion statute, 26 U.S.C. § 7201," because he had helped others evade taxes rather than evading his own taxes. Pet. App. 5a. Section 7201 applies to "[a]ny person who willfully attempts in any manner to evade or defeat any tax," and the court observed that "[t]he statute's expansive language is not susceptible to [petitioner's proposed] limitation." *Ibid.* The court also noted that "[n]o case interpreting [Section] 7201 appears to have adopted any limit to its reach," and to the contrary "those cases that have considered [Section] 7201's scope have rather expressed it expansively." *Ibid.* The court concluded that petitioner had "involved [himself], with the requisite intent, in a scheme to avoid taxes," and the court found "no statutory basis for excluding [him] from liability under [Section] 7201." *Id.* at 6a.

ARGUMENT

Petitioner claims that this Court should grant certiorari to determine whether the court of appeals correctly held that (1) any ambiguity in the application of the "economic substance" doctrine does not negate the jury's finding that petitioner acted willfully in committing tax evasion (Pet. 8-11); (2) petitioner violated the federal tax evasion statute, 26 U.S.C. 7201, by assisting third-party taxpayers in filing false tax returns (Pet.

11-12); and (3) there was sufficient evidence presented at trial that petitioner was aware that the loan-premium transactions at issue lacked economic substance (Pet. 12). With respect to all three claims, the unpublished decision below is correct and does not conflict with any decision of this Court. In addition, the first claim does not implicate a circuit conflict warranting this Court's review; the second claim does not implicate any circuit conflict at all; and the third claim rests on a fact-specific ruling concerning the sufficiency of the evidence in this case. Further review is not warranted.

1. a. It is well-settled that a defendant convicted of tax evasion must have "willfully" attempted to evade a tax that is due, and "willfulness" in this context means a "voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 498 U.S. 192, 199, 201 (1991). As the court of appeals concluded, objective uncertainty in the law does not necessarily undermine a jury's finding that the defendant acted willfully. See Pet. App. 4a-5a. The Second Circuit first applied that standard in *United States* v. *Ingredient Technology Corp.*, 698 F.2d 88, cert. denied, 462 U.S. 1131 (1983). In that case, the defendants argued that their convictions should have been vacated because of the exclusion of expert testimony and omission of jury instructions on the terms of a Treasury regulation, which they said thwarted their defense that the applicable tax law did not provide "a clear and definite statement of the conduct proscribed." *Id.* at 96 (citation and internal quotation marks omitted). The court held that any ambiguity in the tax law was irrelevant unless that ambiguity had

an effect on the defendants' subjective beliefs. *Id.* at 97.[2]

The Fifth and Sixth Circuits also have adopted that rule. See *United States* v. *Burton*, 737 F.2d 439, 444 (5th Cir. 1984) (holding that at least absent such a high degree of legal uncertainty as to "approach[] legal vagueness," "[e]vidence of legal uncertainty, except as it relates to defendant's effort to show the source of his state of mind, need not be received"); *United States* v. *Curtis*, 782 F.2d 593, 599 (6th Cir. 1986) (holding that evidence of uncertainty in the law is irrelevant unless the ambiguity affected a defendant's subjective belief about the legality of his conduct). As those courts have recognized, willfulness "relates to the defendant's state of mind," and evidence that a defendant acted willfully must normally be negated by evidence that the defendant subjectively believed that his conduct was lawful. *Curtis*, 782 F.2d at 599.

The requirement that a defendant act willfully is intended to protect from criminal prosecution the ordinary taxpayer who mistakenly believes that his conduct was lawful; it is not intended to protect a defendant who intentionally attempts to exploit a supposed ambiguity in the tax laws. See, *e.g.*, *Sanders* v. *Freeman*, 221 F.3d 846, 855-856 (6th Cir.) ("[The defendant] chose to risk

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[2] Contrary to petitioner's contention (Larson Pet. 18), the Second Circuit's decision in *United States* v. *Pirro*, 212 F.3d 86 (2000), does not conflict with *Ingredient Technology*. *Pirro* affirmed the dismissal of a portion of an indictment not because the legal duty was ambiguous, but because that part of the indictment did not charge a violation of any legal duty and failed to allege the essential facts of the offense. See *id.* at 91, 95. Even if there were any tension between *Pirro* and *Ingredient Technology*, this Court does not sit to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

prosecution for tax evasion in exchange for greater profits. That his attempt to exploit the ambiguity in the tax laws failed is not a basis for granting relief."), cert. denied, 531 U.S. 1014 (2000). Petitioner was not an innocent victim of a confusing law, and the jury reasonably concluded that petitioner subjectively believed that the BLIPS program was an illegal tax shelter.

b. Petitioner contends (Larson Pet. 13-20) that the decision below conflicts with decisions of the Fourth, Seventh, Ninth, and Eleventh Circuits holding that objective uncertainty in the tax law precludes a finding of willfulness.[3] That conflict is more apparent than real, and none of the cases cited by petitioner precludes the conviction of a defendant who is aware of a legal duty and who voluntarily and intentionally violates it.

In *United States* v. *Critzer*, 498 F.2d 1160 (4th Cir. 1974), the defendant was a member of an Indian tribe

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[3] Petitioner contends (Pet. 14) that the purported conflict arose as a result of this Court's decision in *James* v. *United States*, 366 U.S. 213 (1966), in which the Court reviewed a conviction for failing to report income from embezzled funds. In an earlier decision, *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946), the Court had held that embezzled money does not constitute income to the embezzler. In *James*, the Court overruled *Wilcox* but nonetheless reversed the conviction. Petitioner is correct that no position commanded a majority in *James*, but only three Justices took the position that ambiguity in the tax laws requires dismissal of criminal tax charges, even if the defendant subjectively believed that his conduct was unlawful. *James*, 366 U.S. at 221-222 (plurality opinion). This Court has subsequently characterized *James* as holding simply that "[t]he requirement of an offense committed 'willfully' is not met * * * if a taxpayer has relied in good faith on a prior decision of this Court." *United States* v. *Bishop*, 412 U.S. 346, 361 (1973). That holding does not bear on this case, because the jury reasonably concluded that petitioner subjectively believed his conduct to be unlawful, and no prior decision of this (or any other) Court validated his conduct.

and she had been advised by the Bureau of Indian Affairs that income derived from her property located on an Indian reservation was not taxable. She nevertheless was charged with failing to report income derived from that property on her federal income tax returns. *Id.* at 1160-1161. Although the court stated that the defendant's "obligation to pay [was] so problematical that [her] actual intent [was] irrelevant," *id.* at 1162, it was clear that the defendant, unlike petitioner, subjectively believed that her income was not taxable based on the advice that she had received from the Bureau of Indian Affairs. *Id.* at 1161 (noting the "undisputed" record that the "local superintendent of the Bureau of Indian Affairs" advised the defendant "that she was not taxable for rental income from her possessory interest in [Eastern Cherokee] band property").

The decision in *United States* v. *Heller*, 830 F.2d 150 (11th Cir. 1987), also provides no support for petitioner's position. In *Heller*, the Eleventh Circuit vacated the defendant's conviction for tax evasion, because the defendant claimed to have used a particular accounting method—"case-closed" accounting—that had been held lawful in a Tax Court decision. *Id.* at 154. The Eleventh Circuit held that the jury should have been instructed that, if the defendant had in fact used case-closed accounting, he had not acted with the requisite willfulness. *Id.* at 155. But *Heller* proceeded on the assumption that the defendant potentially had acted in good-faith reliance on legal authority. *Id.* at 154-155. Here, petitioner can make no such claim, and he points to no authority purporting to uphold BLIPS. To the contrary, as the jury reasonably concluded, petitioner subjectively believed his conduct to be unlawful. *Heller* did not hold that a defendant who correctly believes his conduct to be

unlawful can escape liability by claiming that the relevant tax law was ambiguous.

The other cases on which petitioner relies (Larson Pet. 16-17), although they contain language stating that a defendant does not act willfully when the underlying tax law is objectively unclear, also held that the tax obligations in those cases were so unclear as to be unconstitutionally vague in violation of the Fifth Amendment. In *United States* v. *Mallas*, 762 F.2d 361 (1985), the Fourth Circuit reversed the defendants' convictions for tax evasion in a case where Treasury regulations did not clearly resolve the highly technical tax liability question at issue. *Id.* at 363. The court explained that both the government and the defendant had advanced plausible interpretations of whether the claimed deductions were allowable, *id.* at 364, and concluded that the defendants therefore lacked "fair warning" that their conduct was unlawful, *id.* at 364-365.[4]

And in *United States* v. *Dahlstrom*, 713 F.2d 1423 (1983), cert. denied, 466 U.S. 980 (1984), the Ninth Circuit concluded that the convictions of several defendants who had promoted the use of foreign trusts as a means of sheltering income could not withstand a sufficiency challenge because "the legality of the tax shelter program * * * was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment." *Id.* at 1425-1428. The Ninth Circuit later clarified that *Dahlstrom*'s holding was based on the premise

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[4] Similarly, in *United States* v. *Harris*, 942 F.2d 1125 (1991), the Seventh Circuit held that the defendants had "no fair warning" that failing to report as income money given to them by a wealthy widower, which they believed to be a gift, would subject them to criminal liability. *Id.* at 1127-1128. The Seventh Circuit specifically stated that its rule was "based on the Constitution's requirement of due process." *Id.* at 1131.

that the "unsettled nature" of the tax shelter scheme denied the defendants "fair notice" under the Fifth Amendment that their conduct was unlawful, as well as made it "impossible for the defendants to have a specific intent to 'willfully' violate" federal tax law. *United States* v. *Solomon*, 825 F.2d 1292, 1297 (1987), cert. denied, 484 U.S. 1046 (1988). The Ninth Circuit now treats the "willfulness" inquiry as coextensive with the due process vagueness inquiry. See *United States* v. *George*, 420 F.3d 991, 995 (2005) (citing the willfulness standard and then stating: "Without sufficient clarity in the law, taxpayers lack the 'fair notice' demanded by due process so that they may conform their conduct to the law.").

The due process holdings of those cases demonstrate that they do not present a true conflict with the court of appeals' decision in this case. None of the cases cited by petitioner rests purely on a holding that ambiguity in the law precludes a statutory finding of willfulness, and given the court of appeals' acknowledgment that ambiguity in the tax law would be relevant "insofar as it bears on constitutional vagueness," there is no reason to believe that any of those other cases would have been decided differently in the Second Circuit. Pet. App. 4a. Petitioner has never contended that the economic substance doctrine is so vague that his convictions amount to a due process violation, and the conflict that petitioner identifies is therefore more apparent than real. This Court's intervention is not warranted.[5]

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[5] Petitioner notes (Larson Pet. 14) that the government filed a petition for a writ of certiorari in *Dahlstrom* seeking resolution of "[w]hether, in a prosecution of promoters of an unlawful 'tax shelter' program, the absence of a prior statute, regulation, or court decision directly establishing the illegality of the scheme precludes a finding of willfulness as a matter of law." Pet. at I, *Dahlstrom*, *supra*

c. Even if there were a conflict among the courts of appeals on the question of whether objective uncertainty in the tax law precludes a jury from finding that a defendant acted willfully in evading taxes, this case presents a poor vehicle to resolve that conflict because the parameters of the economic substance doctrine were not objectively unknowable to petitioner. Moreover, petitioner has not demonstrated that the loan-premium transactions had economic substance under any test.

It is well-settled that a financial transaction may be disregarded for tax purposes if it lacks "economic substance." See, *e.g.*, *Nebraska Dep't of Revenue* v. *Loewenstein*, 513 U.S. 123, 133-134 (1994); *Frank Lyon Co.* v. *United States*, 435 U.S. 561, 576-580 (1978); *Lee* v. *Commissioner*, 155 F.3d 584, 586 (2d Cir. 1998); *James* v. *Commissioner*, 899 F.2d 905, 908 (10th Cir. 1990); *Kirchman* v. *Commissioner*, 862 F.2d 1486, 1492 (11th Cir. 1989). The test that is widely used among the courts of appeals to determine whether a transaction lacks economic substance asks (1) whether the taxpayer was motivated by a business purpose other than obtaining income tax benefits and (2) whether there is a reasonable possibility that the transaction would result in a profit. *Rice's Toyota World, Inc* v. *Commissioner*, 752 F.2d 89, 91 (4th Cir. 1985); see also *ACM P'ship* v. *Commissioner*, 157 F.3d 231, 247 (3d Cir. 1998), cert. denied, 526 U.S. 1017 (1999); *Casebeer* v. *Commissioner*, 909 F.2d 1360, 1363 (9th Cir. 1990). Petitioner repeat-

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(No. 83-1297) This Court denied the petition for a writ of certiorari, 466 U.S. 980 (1984), and subsequent decisions have made clear that the Ninth Circuit considers ambiguity relevant only to the extent that it renders the law unconstitutionally vague. Petitioner does not contend that the circuits remain in conflict on the specific question presented in *Dahlstrom*.

edly endorsed that formulation of the economic substance doctrine in pretrial filings. Gov't C.A. Br. 70, 113-114.

Furthermore, petitioner's opinion letters that were produced and marketed as part of the BLIPS scheme demonstrate that the economic substance doctrine was well-defined and objectively knowable at the time of petitioner's conduct. The opinion letters discussed the relevant case law and concluded that there had to be a "reasonable possibility of profit" for the transaction to have economic substance. Gov't C.A. Br. 111-112. Petitioner's opinion letters framed the key economic substance question as whether the taxpayer has "a reasonable possibility of economically benefitting from the transaction without regard to tax benefits," *id.* at 81, and the KPMG opinion letter states that "the case law applying the business purpose/economic substance doctrine consistently" requires "a reasonable potential for making a pre-tax profit," *ibid.*

Although petitioner evidently had a clear understanding of what the economic substance doctrine required in the opinion letters and during pretrial proceedings, petitioner later requested a jury instruction stating that a financial transaction lacks economic substance if it involves "no possibility" of making a profit. Gov't C.A. Br. 66-67; Larson Pet. 8. Petitioner now changes his formulation again, contending that the economic substance of BLIPS was reasonably debatable because some courts require only that the transaction have "any practical economic effects other than the creation of income tax losses." Larson Pet. 24 (citation omitted).

Petitioner fails to explain however, how his proposed any-practical-economic-effects test is functionally differ-

ent from the reasonable-possibility-of-profit test articulated in his opinion letters and by the court of appeals. Nor does petitioner explain how the BLIPS program—in which the participating banks would not permit any of the loan funds to leave the banks' control, and the transactions were not even designed to make a profit, see pp. 3-6, *supra*—had "any practical economic effect" other than to create tax losses for BLIPS' clients. Petitioner thus has not established that the loan-premium transactions at issue had economic substance under the test that he currently espouses.

Petitioner has therefore failed to show how the asserted ambiguity in the law even conceivably affected the lawfulness of petitioner's conduct: there is no reason to believe that his conduct may have been lawful under any legal standard for the economic substance doctrine. This case therefore does not present a suitable occasion for addressing the relevance of ambiguity in the underlying tax law when the jury expressly finds that the defendant acted willfully.

d. Petitioner's further contention (Larson Pet. 20-21) that the decision below conflicts with this Court's decision in *Safeco Insurance Co.* v. *Burr*, 551 U.S. 47 (2007) (*Safeco*), is without merit. In *Safeco*, the Court addressed a provision of the Fair Credit Reporting Act, 15 U.S.C. 1681n(a), that imposes civil liability on anyone who "willfully" fails to provide notice of certain adverse actions to consumers. The *Safeco* Court held that the provision applies to conduct undertaken in reckless disregard of the statutory notice requirement. 551 U.S. at 56-57. In reaching that conclusion, the Court explained that "where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only

knowing violations of a standard, but reckless ones as well." *Id.* at 57.

This Court was careful to explain in *Safeco* that its discussion of willfulness, a word "whose construction is often dependent on the context in which it appears," 551 U.S. at 57 (quoting *Bryan* v. *United States*, 524 U.S. 184, 191 (1998)), pertained only to liability under the Fair Credit Reporting Act, *id.* at 58. The Court's statement in a footnote that evidence of subjective bad faith cannot support a finding of willfulness if the defendant's reading of a statute is objectively reasonable, *id.* at 70 n.20, was informed by the Court's conclusion that "in the sphere of civil liability," recklessness entails "conduct violating an objective standard," *id.* at 68. The willfulness standard applied in *Safeco* is far different from the willfulness standard applicable to criminal tax evasion, where "willfulness" is "the voluntary, intentional violation of a known legal duty." *Cheek*, 498 U.S. at 201.

2. Petitioner contends that he could not be convicted under the federal tax evasion statute, 26 U.S.C. 7201, for helping others to evade their taxes, because that statute applies only "to taxpayers who willfully attempt to evade and defeat their own tax liabilities." Pet. 11. But as the court of appeals recognized, the text of the statute admits of no such limitation. Pet. App. 5a-6a. Section 7201 provides that "*[a]ny person* who willfully attempts *in any manner* to evade or defeat *any tax* * * * [is] guilty of a felony" (emphases added). The statute is thus drafted broadly to reach "any conduct, the likely effect of which would be to mislead or to conceal" any tax liability. *Spies* v. *United States*, 317 U.S. 492, 499 (1943). As this Court explained in *Spies*, "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps

did not define lest its effort to do so result in some unexpected limitation." *Ibid.* The court of appeals correctly declined to "constrict the scope" of Section 7201, which provides that tax evasion "may be accomplished 'in any manner.'" *Ibid.*

Petitioner does not cite any authority interpreting Section 7201 to apply only to a defendant's evasion of his own tax liabilities. To the contrary, as the court of appeals noted, "those cases that have considered [Section] 7201's scope have rather expressed it expansively." Pet. App. 5a; see, *e.g.*, *United States* v. *Townsend*, 31 F.3d 262, 267 (5th Cir. 1994) ("[Section] 7201 is not limited to prosecutions of those who evade taxes that they may owe themselves, but rather it encompasses prosecutions of any person who attempts to evade the tax of anyone."), cert. denied, 513 U.S. 1100 (1995); *Tinkoff* v. *United States*, 86 F.2d 868, 876 (7th Cir. 1936) ("Nor is it any defect that the tax attempted to be evaded was that of another. The statute is so framed as to make liable any person who attempts willfully and unlawfully to evade the tax of himself or of any other person."), cert. denied, 301 U.S. 689 (1937).

Petitioner claims that, because he "had no role in preparing the actual tax returns of the taxpayers at issue," his conduct was "too remote" from the falsification of those returns to render him liable for tax evasion. Pet. 11-12. As a legal matter, it does not matter for purposes of Section 7201 whether petitioner participated in the preparation of the actual returns at issue, so long as he attempted "in any manner to evade or defeat any tax." 26 U.S.C. 7201; see, *e.g.*, *United States* v. *Doughty*, 460 F.2d 1360, 1362 (7th Cir. 1972) ("It was unnecessary for defendant's conviction of aiding and abetting that the government prove he helped prepare and file the false

return. It was sufficient that he participated in the commission of the offense."); *United States* v. *Frazier*, 365 F.2d 316, 318 (6th Cir. 1966) ("[I]t was not necessary for the Government to prove that [the defendant] had anything to do with the actual preparation or filing of the income tax returns."), cert. denied, 386 U.S. 971 (1967).

As a factual matter, there was sufficient evidence introduced at trial that petitioner had assisted BLIPS' clients in evading their tax liabilities. Most importantly, petitioner prepared over 150 opinion letters that contained false and misleading statements; those letters were intended to deceive the IRS as to the true nature of the BLIPS program. See p. 6, *supra*. Although petitioner did not have direct contact with BLIPS' clients, the jury reasonably concluded that his conduct was in no way remote from their tax evasion: petitioner participated in designing and marketing BLIPS, procuring the cooperation of the banks involved, and issuing the opinion letters that were essential to the continued operation and marketing of BLIPS. Petitioner's conduct was critical to the ability of Presidio and BLIPS' clients to generate nonexistent tax losses in order to evade offsetting tax liabilities.

Finally, petitioner fails to address the alternative theory submitted to the jury that he aided and abetted in the preparation of the clients' false returns under 18 U.S.C. 2. See Gov't C.A. Br. 146. The district court instructed the jury that it could find petitioner guilty as an aider and abettor if it found that (i) the taxpayer at issue had committed at least one act that would have been an affirmative act of evasion if he had acted with the willful intent to evade taxes and (ii) petitioner was a cause in fact of the taxpayer's actions or played a sub-

stantial part in bringing about or causing the taxpayer to file a false return. *Id.* at 155-156. Petitioner does not challenge those instructions before this Court.

Even assuming (incorrectly) that Section 7201 were limited to "acts of evasion committed by people actually involved in the filing and/or payment of the tax," Larson Pet. 30, and that petitioner did not qualify under that test (despite his role in marketing BLIPS to the taxpayers, see Gov't C.A. Br. 3-12, 150-151), any rational jury that found guilt under the government's theory of liability would also have found aiding and abetting liability. "One purpose of 18 U.S.C. § 2 is to enlarge the scope of criminal liability under existing substantive criminal laws so that a person who operates from behind the scenes may be convicted even though he is not expressly prohibited by the substantive statute from engaging in the acts made criminal by Congress." *United States* v. *Ruffin*, 613 F.2d 408, 413 (2d Cir. 1979); see Gov't C.A. Br. 156-157. That description would cover petitioner even under his own theory of the case. Accordingly, because any rational jury that convicted petitioner would necessarily have found that petitioner played a substantial role in causing BLIPS' clients to commit affirmative acts of evasion by filing false returns, the claimed error on the scope of Section 7201 is harmless beyond a reasonable doubt. *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 & n.46 (2010) (alternative theory error is subject to harmless-error analysis).

3. Petitioner also contends (Pet. 12) that there was not sufficient evidence indicating that he was aware the BLIPS transactions lacked economic substance. That fact-bound challenge to the sufficiency of the evidence does not merit this Court's review. In any event, the courts below correctly concluded that there was ample

evidence "that the transaction[s] lacked any non-tax economic effect," because "[t]estimony described the chances of profiting from the investments as 'basically zero.'" Pet. App. 4a; see Gov't C.A. Br. 141-145. The court of appeals noted that "[c]lients testified that the transactions were marketed solely as tax-avoidance schemes, and that, as clients, they had no non-tax business purpose in executing them." Pet. App. 4a. The court concluded that "BLIPS was designed, marketed, and executed as a tax shelter; and the jury was warranted in concluding that all parties knew BLIPS's profit potential to be nothing more than a pretext." *Ibid.*

With respect to petitioner in particular, the court of appeals explained that "sufficient evidence was presented to the jury to support its finding that [petitioner] either knew or consciously avoided knowing that the taxpayers lacked a non-tax business purpose * * * and that there was no reasonable possibility that the transaction would yield a profit." Pet. App. 5a. As the court of appeals recognized, "[petitioner] was aware that the investors had no reasonable expectation of a profit unless they remained invested for the long term[] and that most of the investors had exited the deals within sixty days." *Ibid.* As a result, the court reasoned, "the jury was free to infer that [petitioner] knew that the transaction had no business purpose based on his close relationship with [co-defendants] Pfaff and Larson." *Ibid.*

In addition to that evidence, there was also evidence presented at trial that petitioner assisted in designing BLIPS and negotiating the loan terms and template loan agreements, see Gov't C.A. Br. 14, 144; that petitioner was aware the issuing banks would retain complete control over the loan funds, see *id.* at 139; and that petitioner attended meetings during which the true na-

ture of the loan arrangements was discussed, see *id.* at 14, 144. Moreover, several of the BLIPS clients were represented by attorneys with the law firm of Gibson, Dunn & Crutcher LLP (GDC). *Id.* at 40. Those GDC attorneys reviewed BLIPS, concluded that it was an impermissible tax shelter, produced a memorandum to that effect (which was provided to petitioner), and advised their clients not to participate. *Id.* at 40-44. Petitioner also participated in telephone conferences in which the GDC attorneys raised questions about BLIPS, including about the truthfulness of representations that petitioner had made in his opinion letters. *Id.* at 41. Finally, petitioner concealed from his law firm the extent of his relationship with, and $500,000 in compensation that he received from, Presidio. *Id.* at 11 n.*, 145. The jury thus had ample evidence before it to support its conclusion that petitioner was aware that the BLIPS program lacked economic substance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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